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No. 05-431

In the Supreme Court of the United States

JOHN P. BURKE, in his Official Capacity as Banking Commissioner of the State of Connecticut,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit correctly held that the Office of the Comptroller of the Currency ("OCC") acted within the bounds of its delegated authority when it determined that the incidental powers of a national bank include the power to carry out the business of banking through operating subsidiaries that are subject to the same terms and conditions, including the exclusive licensing and visitorial authority of the OCC, as the banks themselves?

CORPORATE DISCLOSURE STATEMENT

Wachovia Bank N.A. and Wachovia Mortgage Corporation state as follows: (1) Wachovia Bank, N.A. is owned by Wachovia of Alabama, Inc., which in turn is owned by Wachovia Corporation, a financial services holding company publicly traded on the New York Stock Exchange; and (2) Wachovia Mortgage Corporation is owned by Wachovia Bank, N.A.

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Respondents, Wachovia Bank, N.A. ("Wachovia Bank") and Wachovia Mortgage Corporation ("Wachovia Mortgage"), respectfully request that this Court deny the petition for a writ of certiorari. In this case, the Second Circuit — in accord with every other court to address the issue — held that state attempts to regulate the operating subsidiaries of national banks are preempted by the National Bank Act and OCC regulations. It is not necessary for this Court to review that decision. The issue of administrative law that is presented by the petition was neither raised below nor addressed by the court of appeals. There is no conflict in the circuits on the questions presented here. The holding below, which affirmed the reasonableness of a well-considered agency regulation, plainly is correct. The petition for a writ for certiorari accordingly should be denied.

COUNTER-STATEMENT OF THE CASE

This case concerns the powers of national banks and the authority of their federal regulator, the OCC. Respondents challenged six Connecticut statutes that directly interfere with Wachovia Bank's ability to conduct banking business through its operating subsidiary, Wachovia Mortgage. The Connecticut statutes conflict with regulations that the OCC adopted under the National Bank Act ("NBA").

The NBA establishes nationally chartered banks, to which it grants, among other things, "all such incidental powers" that are necessary to conduct the business of banking. 12 U.S.C. § 24 (Seventh). The NBA further provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a). Since 1966, the OCC has recognized that national banks have the incidental power to conduct the business of banking through operating subsidiaries. 31 Fed. Reg. 11,459, at 11,459-60 (Aug. 31, 1966).

The OCC has "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh" and has the power to promulgate regulations that define "incidental powers" of national banks. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995); 12 U.S.C. § 93a. Pursuant to this authority, the OCC has promulgated regulations providing that:

- the OCC has exclusive visitorial authority over national banks (12 C.F.R. § 7.4000);[1]
- a national bank "may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking" (12 C.F.R. § 5.34(e)(1));
- an operating subsidiary may conduct "activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank" (12 C.F.R. § 5.34(e)(3));
- the standards for real estate lending, as authorized by 12 U.S.C. § 371(a), apply to loans provided by "national banks and their operating subsidiaries" (12 C.F.R. § 34.1);
- a national bank may make real estate loans without regard to specified types of State laws that "obstruct, impair, or condition a national bank's ability to fully

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[1] "Visitorial authority" refers to the power to examine a bank, inspect its books and records, regulate and supervise its activities authorized by federal banking law, and enforce compliance with applicable state and federal laws concerning those activities. 12 C.F.R. § 7.4000(a)(2)(i)-(iv).

exercise its Federally authorized real estate lending powers" (12 C.F.R. § 34.4); and

- "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank" (12 C.F.R. § 7.4006).

When the OCC recently revised some of its regulations, it explained that increasing state banking regulations had hindered "national banks' ability to conduct operations to the full extent authorized by Federal law." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004). The OCC further explained that its responsibility for the "safe and sound operations" of national banks was central to its promulgation of these regulations. *Id.* at 1907.

In the face of this federal framework, Connecticut sought to use six banking statutes to regulate mortgage lenders operating in the State. Two statutes required first and second mortgage lenders — exempting national banks but not their operating subsidiaries — to obtain state licenses; two required mortgage lenders to maintain certain records and make them available for inspection by the Petitioner; and two empower the Petitioner to enforce these laws with, *inter alia*, cease and desist orders. Conn. Gen. Stat. §§ 36a-50, 52, 486, 487, 493, 511, 516.

Respondents challenged Petitioner's exercise, as against operating subsidiaries of national banks, of the regulatory authority purportedly granted in these Connecticut statutes, which conflict with the federal regulatory framework described above. Affirming the District Court's grant of summary judgment, the Second Circuit properly held that the OCC regulations, including § 7.4006, "reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with

national banks' exercise of their powers under 12 U.S.C. § 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 321 (2d Cir. 2005). (App. at A-28.) The court also identified independent bases for preemption in 12 C.F.R. §§ 34.1(b) and 34.4, which provide that the regulations apply to both national banks and operating subsidiaries and that state laws that interfere with a national bank's real estate lending activities do not apply to national banks. 414 F.3d at 321. (App. at A-27.) Accordingly, the Second Circuit deferred to the OCC's interpretation of the NBA's policy choices, in which the OCC's regulations are grounded, and expressly rejected the notion that it was deferring to the OCC's legal interpretation of the preemptive force of its regulations. 414 F.3d at 320. (App. at A-25-26.) On the basis of this analysis, the Second Circuit held that the NBA and OCC regulations preempted the conflicting Connecticut statutes.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to resolve a supposed conflict among the courts of appeals by deciding whether the OCC's view "as to the preemption of state law under the National Bank Act [is] entitled to judicial deference." (Pet. at i.) The Petition should be denied for three reasons. First, the principal issue on which Petitioner seeks review was not raised below by Petitioner or addressed by the Second Circuit, and, therefore, it was not properly preserved for review by this Court. Second, there is no conflict among the Circuits, or among any other courts, with regard to the issues that the court of appeals actually decided and that this case presents. Petitioner's manufactured conflict, arising from a misreading of the Second Circuit's decision, does not provide an appropriate basis for this Court's review. Finally, for the reasons set forth in the opinions of the Second and Ninth

Circuits and of the four district courts to have considered the issue actually presented, the decision below is correct.

A. The First Issue For Which Petitioner Seeks Review Was Not Raised Below.

The first question presented in the petition raises "the question whether judicial deference should be accorded an agency opinion on preemption." Pet. 11-12. In particular, the Petitioner claims that the Second Circuit departed from other circuits by "[a]pplying the deferential standard of *Chevron U.S.A., v. Natural Resources Defense Council*, 467 U.S. 837 (1984)" to the preemption issues raised in this case. Pet. 11. Petitioner, however, never denied below that the principles articulated in *Chevron* should guide the decision here. Accordingly, to the extent that Petitioner now seeks to challenge the appropriateness of applying the *Chevron* framework, that challenge should be rejected as unpreserved.

Petitioner argued below that the *Chevron* framework supported its argument that the OCC's view of the preemptive scope of the NBA was not entitled to judicial deference, contending only that the OCC misunderstood the meaning of the NBA. In its briefs to the Second Circuit, Petitioner properly characterized *Chevron* as "the seminal case," citing it extensively and applying its analysis to advocate rejection of the OCC's interpretation of the NBA, without ever arguing that *Chevron* should not apply. (Pet'r's Second Circuit Br. at 29-34; Pet'r's Second Circuit Reply Br. at 1-15.) The Second Circuit therefore noted that "[n]either party has questioned that the *Chevron* framework generally applies in this case." 414 F.3d at 315 n.6. (App. at A-15-16.)

In the Petition, however, Petitioner shifts his position, now challenging the applicability of *Chevron* and arguing that the Second Circuit improperly limited its inquiry to whether the OCC's view of preemption was reasonable. (Pet. at 11.) Petitioner would have this Court decide whether

Chevron deference analysis is proper at all, where, as Petitioner argues, it is solely the agency's view of preemption — a purely legal question as to which Petitioner asserts the OCC has no special expertise — that is at issue.

This Court does not permit parties to raise new arguments in their petitions for certiorari, and Petitioner's attempt to do just that should be rejected. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 54-56 (2002); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990). Having never challenged the applicability of *Chevron* below and, to the contrary, having relied extensively on the *Chevron* deference analysis in support of his argument that the OCC's view of preemption was not reasonable and was, therefore, not entitled to deference,[2] Petitioner cannot now argue that the Second Circuit should not have applied the *Chevron* framework.

B. There Is No Conflict Among The Courts Of Appeals, Or Any Other Courts, On The First Question Presented.

Petitioner seeks to manufacture a conflict among the courts of appeals by asserting that the Second Circuit decided a question it did not, in fact, decide: whether to defer to the OCC's position on the purely legal question of the preemptive scope of the NBA and the OCC's regulations vis-à-vis state laws purporting to regulate national banks' operating subsidiaries. Petitioner then mischaracterizes the decision below as inconsistent with other courts of appeals' decisions about the level of deference to which agency assertions of preemptive scope are entitled.

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[2] For example, Petitioner asserted below: "Section 7.4006 is premised on an unreasonable interpretation of the National Bank Act's provisions and is entitled to no deference from this Court. Under the seminal case of *Chevron* ..." (Pet'r's Second Circuit Br. at 29.)

1. *The Second Circuit's Decision Did Not Turn On Deference To The OCC's View On Preemption.*

In support of his attempt to manufacture a circuit conflict, the Petitioner misreads the Second Circuit's evaluation of one regulation, 12 C.F.R. § 7.4006, and ignores the independent, alternative bases for the court's holding grounded upon two other regulations.

First, the Second Circuit flatly rejected Petitioner's characterization of § 7.4006 as embodying only a legal interpretation of preemption case law and, instead, noted that § 7.4006 "at its core, reflects a policy judgment about national banks' use of operating subsidiaries." 414 F.3d at 320. (App. at A-25.) The Second Circuit then determined that the OCC's policy judgment was reasonable, in that § 7.4006 reflected "the OCC's position that national banks should be able to 'use the operating subsidiary as a convenient and useful corporate form for conducting activities' without substantial restrictions imposed by states." 414 F.3d at 320. (App. at A-25.) The Court of Appeals quoted the OCC's expression of the negative effect of "multiple, often unpredictable, different state or local restrictions" on national banks. 414 F.3d at 321. (App. at A-27.) Moreover, the court acknowledged the reasonableness of "the OCC's policy judgment that national banks' use of operating subsidiaries as separately structured corporate entities is desirable and that it should not be hindered by state regulations." 414 F.3d at 319. (App. at A-23.)

The Second Circuit recognized that Petitioner's challenge to the OCC's regulations centered on his disagreement with the OCC's policy choices; for example, the Second Circuit described Petitioner as arguing "that this rationale [underlying §7.4006] unreasonably disregards the corporate separateness of a parent bank and improperly allows national banks to take advantage of the legal benefits of conducting business through a subsidiary..." 414 F.3d at 318. (App. at

A-22-23.) The Second Circuit admonished Petitioner that such policy arguments should be directed to Congress, not to the courts.[3]

Second, the Second Circuit determined that, even if § 7.4006 were not imbued with the OCC's reasonable interpretation of the policy choices underlying the NBA, thus making deference to it appropriate under *Chevron*, two other regulations, sections 34.1(b) and 34.4, "independently support a finding of preemption in this case." 414 F.3d at 321. (App. at A-27.) Section 34.1(b), which by its terms provides that it applies to national banks and operating subsidiaries, states that the purpose of the regulations is to set standards for real estate-related lending and associated activities by national banks; section 34.4 provides that, unless otherwise provided by federal law, state laws that interfere with a national bank's ability to exercise its real estate lending powers do not apply to national banks. These independent bases for preemption arise from these two sections because the regulations reflect the OCC's view that the NBA embodies a substantive policy choice that national banks and their operating subsidiaries must be able to "operate under uniform, consistent, and predictable standards," unimpeded by the vagaries of state law. The Second Circuit concluded that this policy choice was

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[3] It is noteworthy that, despite Petitioner's rhetoric about "the growing and potentially ruinous problem of predatory lending" that will result from the Second Circuit's decision (Pet. at 10), the six challenged Connecticut statutes are not substantive in nature, that is, they concern only licensing and visitorial authority and are not consumer protection laws. Moreover, it is the OCC, not state officials, that has responsibility for enforcing applicable state laws, to the extent they are not preempted, against national banks. *See Nat'l State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980).

reasonable. 414 F.3d at 320 (citing 69 Fed. Reg. at 1907 (Jan. 13, 2004)). (App. at A-27.)

The OCC's reasonable determinations, based on the NBA and reflected in federal regulations, form the backdrop for the Second Circuit's ruling. In light of its understanding of federal law and the business of banking, the OCC concluded that national banks must be able to make unimpeded use of operating subsidiaries to conduct core banking activities, including mortgage lending. In deference to the OCC's substantive analysis, the Second Circuit held that Petitioner's effort to assert licensing and visitorial authority over operating subsidiaries of national banks conflicted with federal law.

2. *The Second Circuit's Decision Does Not Conflict With The Tenth and Eleventh Circuit Decisions Cited By Petitioner.*

The decisions from the Tenth and Eleventh Circuits that Petitioner cites as conflicting authority are not, in fact, inconsistent with the Second Circuit's decision below because they do not suggest that courts should refuse to defer to an agency's reasonable interpretation of the meaning of the statutes and regulations within its purview. Rather, the Tenth and Eleventh Circuit cases hold that deference to an agency's purely legal interpretation as to preemption is not appropriate, an issue the Second Circuit did not address, as discussed above.

In *Bankwest, Inc. v. Baker*, 411 F.3d 1289, 1300-01 (11th Cir. 2005), the parties disagreed over the FDIC's position on preemption. Without resolving that dispute, the Eleventh Circuit observed that it would not defer to the FDIC's opinion, whether formal or informal, because only an agency's substantive interpretations of the meaning of a statute warrant deference. The Tenth Circuit, in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571,

1578-79 (10th Cir. 1991), faced a regulation that codified the judicially-created test for preemption. The court held that, although the substance of the Secretary of Transportation's opinion regarding the subject matter of its regulations was entitled to deference, the court must make its own legal determination of preemption.

Both the *Harmon* decision and the *Baker* decision flow from this Court's approach in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996). The rulings distinguish between agency opinions on the substantive meaning of regulations — which are entitled to deference — and agency opinions on the preemptive scope of regulations — which are not entitled to deference. So, too, by deferring to the OCC's substantive views, the Second Circuit's decision below adhered to *Smiley* and was not inconsistent with *Harmon* or *Baker*.

Because the Second Circuit below did not, as Petitioner suggests, decide the propriety of deferring to a purely legal interpretation of the preemptive scope of the statute or regulation at issue, the cases Petitioner cites as inconsistent on that undecided issue do not, in fact, conflict with the decision below. Accordingly, the split among the courts of appeals that Petitioner asserts does not exist.

C. The Second Circuit Properly Concluded That The National Bank Act And OCC Regulations Preempt State Law.

The Second Circuit's decision was correct on the merits and does not warrant review by this Court. All courts that have considered the question actually presented in this case — "whether the NBA and OCC regulations preempt state banking laws concerning operating subsidiaries of nationally chartered banks" (414 F.3d at 309 (App. at A-4)) — have decided the issue in the same way the Second Circuit did below.

In the only other court of appeals decision on this issue, the Ninth Circuit held, in *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 954 (9th Cir. 2005),[4] that the NBA preempts "the California Commissioner of Corporations' ... exercise of investigative and licensing authority over 'operating subsidiaries' of national banks." The court determined that the OCC had authority not only to allow national banks to create operating subsidiaries that perform national bank functions, but also to regulate operating subsidiaries of national banks. The Ninth Circuit held that the OCC's regulations permissibly reserved visitorial power over operating subsidiaries of national banks to the OCC. 419 F.3d at 964.

The *Boutris* analysis was guided by the *Chevron* framework. The Court held that the OCC's interpretations of the NBA were entitled to deference because of the close relationship between the OCC's substantive policy determinations and its preemption regulation. In other words, "§ 7.4006 is 'a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" 419 F.3d at 963 (citations omitted).

Similarly, the four district courts to have decided the issue presented in this case have decided in favor of preemption by the OCC's regulations of state laws that seek to regulate operating subsidiaries of national banks. *Office of the Comptroller of the Currency v. Spitzer*, No. 05 Civ. 5636, 2005 U.S. Dist. LEXIS 23209 (S.D.N.Y. Oct. 12, 2005) (granting declaratory and injunctive relief to OCC to preclude New York Attorney General from enforcing certain state banking laws against national banks or their operating subsidiaries, on the ground that the state laws conflict with

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[4] The Ninth Circuit decided *Boutris* shortly after the Second Circuit decided this case.

and are preempted by NBA and OCC's reasonable regulations); *National City Bank v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) (holding that Maryland banking laws purporting to authorize state banking commissioner to exercise licensing and visitorial authority over operating subsidiaries of national banks are preempted by NBA and OCC's regulations); *Wachovia Bank, N.A. v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich. 2004) (rejecting challenge to OCC's regulations as unreasonable and holding that Michigan statutes that conflict with OCC's regulations are preempted); *Wells Fargo Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003), *aff'd in part*, 419 F.3d 949 (9th Cir. 2005). No court has decided the issues actually addressed by the Second Circuit below in a contrary manner.

The Second Circuit properly concluded below that the OCC's regulations reflected a reasonable policy choice to protect the "safe and sound operations" of national banks and their operating subsidiaries by eliminating the disruption of inconsistent state banking laws. 414 F.3d at 319-21. (App. at A-22-28.) Aside from differing about the wisdom of this policy,[5] Petitioner offers no basis for challenging the

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[5] Petitioner argues at considerable length that Connecticut's statutes should not be preempted because "[t]he regulation of operating subsidiaries … is a matter of vital importance to states." Pet. at 15; *see id.* at 15-20. For reasons noted above in footnote 3, petitioner is incorrect in arguing that consumers will be left without protection if the Connecticut laws at issue here are preempted. But this argument is, in any event, wrong on its own terms: it has long been settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fid. Fed. Sav. and Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). Indeed, even where the state has a "compelling interest" in preservation of its law, "under the Supremacy Clause, from which our pre-emption doctrine is

propriety of the Second Circuit's decision on the merits of the dispute. This case does not present, therefore, a basis for this Court's review, and the petition should be rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2005

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derived, any state law, ... clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (plurality opinion) (internal quotation marks and citations omitted).